U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: August 9, 1999

CASE NO. 1999-INA-148

In the Matter of:

ABRAHAM GORDON
Employer,

on behalf of

LEOTYNA CHOWANIEC,
Alien.

Appearance: Paul W. Janaszek
Eastern European Council, LTD
New York, New York

Certifying Officer: Dolores Dehann
New York, New York

Before: Burke, Neusner and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C.§1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for

the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United‘States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

STATEMENT OF THE CASE

This case was previously before a panel of the Board on August 22, 1997, under Docket Number 1995-INA-342 and the Decision and Order issued at that time is incorporated herein by reference.

In the original application in this case ("ETA 750A"), Employer sought certification to employ the Alien as a "Cook Kosher" with the following duties:

> Prepare, season, and cook soups, meats, vegetables according to the Kosher dietary requirements. Bake, broil and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls, Decorate dishes according to nature of celebration. Purchases foodstuff and accounts for the expenses incurred. (AF 5).

The CO issued a Final Determination ("FD"), denying certification on the grounds that Employer had not established that her job opening was a full-time position. (AF 37). The Board's prior Decision and Order held that the evidence showed the position was in fact, full-time but, there remained an issue as to whether the description requirement of two years of specialized cooking experience was unduly restrictive. (AF 58). Accordingly, the matter was remanded to the CO in order to give Employer the opportunity to show a business necessity for the requirement. *Id.*

Upon return of the case to the CO, a new Notice of Findings ("NOF") was issued, in which the CO directed Employer to either document the business necessity for requiring two years experience performing the duties of Kosher cooking or delete the requirement and indicate a willingness to readvertise the position. (AF 63-64).

Employer responded to the NOF by submitting an amended ETA 750A for a "Family Dinner Service Specialist" with the duties changed as follows:

> Prepare, season, and cook soups, meats, vegetables, according to the recipes and taste of employer. Bake, broil and steam meat, fish and other food. Perform seasonal cooking duties, such as preserving and canning fruits and vegetables. Decorate dishes according to the nature of the celebration. Purchase foodstuff and accounts for the expenses incurred.(AF 68).

Employer continued to require two years experience in the job offered. *Id.*

The CO proceeded to issue a FD in which the application was denied for the following reasons:

> "Our Notice of Findings directed Employer to rebut the findings by either deleting the ethnic/religious cooking requirement or documenting how the requirement arises from business necessity. In rebuttal, Employer has deleted the requirement of Kosher cooking experience, amended the wage to meet prevailing, and documented willingness to readvertise. (AF 74).
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> "In rebuttal, employer has also added the following job duties to item 13 of ETA 750A form: **Performs seasonal cooking duties such as preserving of fruits and vegetables.** These duties are considered unduly restrictive. The addition of job duties to item 13 was not an alternative in our Notice of Findings. In essence, these added requirements render any otherwise qualified Cook, Domestic, unqualified if they do not have 2 years of experience in preserving and canning fruits and vegetables. The addition of these job duties has the effect of substituting one unduly restrictive requirement for another and once again impedes our testing of the labor market. (AF 73-74).

Employer again requested a review of the denial and the record has been returned to the Board for such purpose.

DISCUSSION

Section 656.20(b) of the regulations provides, in pertinent part:

(2) The employer shall document that the job opportunity has been and is being described without unduly restrictive requirements;

(i) The job opportunity's requirements, unless adequately documented as arising from business necessity;

(A) Shall be those normally required for the job in the United States;

(B) Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs.

The position has been classified as a Domestic Cook and as contended by Employer, the duties of the position as set forth in her amended ETA 750A are those listed in the *D.O.T.* for COOK (domestic ser.) under code 305.281-010:

> Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. **Plans menus** and orders foodstuffs. **Cleans** kitchen and **cooking utensils**. May **serve meals**. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and **making jellies**. **May prepare fancy dishes** and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired, or other persons and be designated Family-Dinner Service Specialist (domestic serv.)
>
> (Emphasis added).

We agree with Employer that as the duties of the amended ETA 750A are those listed in the *D.O.T.* for the position, the CO erred in considering them to be restrictive. *See e.g., Lebanese Arak Corp.* 87-INA-683 (Apr. 24, 1989) (*en banc*). If the job requirements are those normally required in the United States and are those defined for the job in the *D.O.T.*, the job's requirements are not unduly restrictive, and it is unnecessary for the employer to document that they arise from business necessity. *Information Industries, Inc.*, 88-INA-82 (February 8, 1989) (*en banc*). Furthermore, although the new NOF specifically offered Employer only the opportunity to amend the ETA 750A by deleting the Kosher cooking specialty, we believe it of no

consequence that Employer sought to amend it generally as long as the amendments do not cause a new violation the regulations.

After a thorough review of the Appeal File, we find that Employer has made an unequivocal offer to re-advertise without the unduly restrictive requirement. Employer's offer was in response to the CO's directions in the NOF, and the circumstances where re-advertisement is not appropriate, do not exist in this matter.[1] Accordingly, this case must be remanded for additional re-advertising/recruitment with the amended job requirements. *See Ronald J. O'Mara*, 96-INA-113 (December 11, 1997) (*en banc*); *Plant Adoption Center*, 94-INA-374 (December 12, 1997) (*en banc*).

We note that the Board's prior decision in this matter (95-INA-342) found that "the Employer did establish that the job duties of this household cook are sufficiently substantial to occupy an eight hour day of work in the Employer's kitchen." (AF 58). However, that decision was based on pre-*Uy* law. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*); *see also Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*); *Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (*en banc*). The full Board recently held that

> the definition of employment in section 656.3 cannot be used to attack the employer's need for the position by questioning the hours in which a worker will actually be engaged in work-related duties. Focusing solely on whether the employment will keep the worker substantially engaged throughout the day casts the problem in the wrong light -- the true issue being whether the employer has a *bona fide* job opportunity.

Schimoler, supra, slip op. at 4 (footnote omitted). Rather, a CO may correctly apply the *bona fide* job opportunity analysis of 20 C.F.R. § 656.20(c)(8) when it appears that the job was misclassified as a skilled domestic cook rather than some other unskilled domestic service position, or where it appears that the job was created for the purpose of promoting immigration. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

Therefore, the CO may re-evaluate the full-time nature of the position under a *bona fide* job opportunity analysis prior to permitting re-advertisement.

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[1]The opportunity to re-advertise does not apply in these situations; *to wit*: (1) The offer to re-advertise is equivocal; (2) The NOF finds that no permanent full-time job exists; (3) The NOF finds that the Employer rejected U.S. applicants who met the restrictive requirements; or (4) The NOF finds a lack of good faith recruitment. *Ronald J. O'Mara*, 96-INA-113, *slip op.* at 3 (December 11, 1997) (*en banc*).

ORDER

For the reasons stated, the Certifying Officer's denial of certification in this matter is hereby **VACATED** and this matter is hereby **REMANDED** for further processing in accordance with this decision.

SO ORDERED.

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Judge John M. Vittone
Chief Administrative Law Judge
Board of Alien Labor Certification Appeals

JMV/pmb/cs

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1)n when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.